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No. 85-685
No. 85-703

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

IN RE AIR CRASH DISASTER AT
MANNHEIM, GERMANY ON SEPTEMBER 11, 1982
MDL 555

CHERYL ANN ESCHLER,
Petitioner,

v.

THE BOEING COMPANY,
Respondent

URSULA SCHOENBORN,
Petitioner

v.

THE BOEING COMPANY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondent The Boeing Company ("Boeing") respectfully submits that the Petitions for Writ of Certiorari should be denied.

LIST OF PARTIES

Petitioners are identified in the two Petitions. Respondent is Boeing.[1]

STATEMENT OF THE CASE

Neither Petition complies with Supreme Court Rule 21.1(i) which requires a showing of the basis for federal jurisdiction in the court of first instance. In each of the cases consolidated for trial in the United States District Court for the Eastern District of Pennsylvania, subject matter jurisdiction was founded solely on diversity of citizenship under 28 U.S.C. § 1332. Petitioners have never claimed the existence of federal question jurisdiction.

Petitioners' Statements of the Case are otherwise incomplete and inaccurate. They virtually ignore the undisputed material facts which are contained in the Third Circuit's decision attached as Appendix A to the Schoenborn Petition.[2] Summarized below are those and additional facts to correct the more gross mischaracterizations and misrepresentations of the record by Petitioners.

On September 11, 1982, a U.S. Army CH-47C "Chinook" helicopter (Helicopter 22292) crashed near Mannheim, West Germany. Although the Schoenborn Petition represents that the helicopter was being used in a "civilian" capacity (Schoenborn Petition at 3, 11, and 18), the uncontradicted record is that the helicopter, which had been owned, maintained and operated exclusively by the U.S. Army since 1974, was being operated at the time of the accident by the U.S. Army during an authorized U.S. Army mission.

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[1] Pursuant to Supreme Court Rule 28.1, Boeing states that all of its current subsidiaries are wholly owned with the sole exception of Trans National Housing Association.

[2] Two Petitions for Writ of Certiorari have been filed. To avoid confusion, the Petition filed in No. 85-703 will be referred to as the Schoenborn Petition, whereas the one filed in No. 85-685 will be referred to as the Eschler Petition.

Petitioners also ignore or obscure the key fact that the accident was caused by the Army's faulty overhaul and inspection of the helicopter's forward transmission. The Army itself determined that the transmission failed in flight because jets which feed oil to the transmission became clogged by walnut shell particles. Those particles had been introduced into the transmission when it was cleaned and overhauled at the Corpus Christi Army Depot. Use of walnut shells as a cleaning abrasive was never approved by either Boeing or the appropriate Army command and the practice was discontinued as a result of this accident.

Petitioners also misrepresent the relative roles of Boeing and the Army in the design of Helicopter 22292. Petitioners repeatedly suggest that Boeing had broad discretion in the design of Helicopter 22292, limited only by the Army's general performance and mission specifications. This is patently untrue. The undisputed evidence, recognized as such by the Third Circuit, was that Helicopter 22292 was built by Boeing under a 1974 defense contract issued by the U.S. Army Aviation Systems Command and strictly in accordance with comprehensive, detailed specifications which the Army made part of the contract. The specifications and incorporated engineering drawings spelled out the configuration of the forward transmission and the drive shaft, including each and every feature which Petitioners claim is defective. Boeing was forbidden to deviate from the contract specifications. The configuration of Helicopter 22292 could not be changed without Army approval which could only be obtained after an elaborate proposal and Army review process established by the contract.

Similarly, Petitioners claim that Helicopter 22292 was built under a "purchase order" which "merely requested production of the manufacturer's pre-existing product." Schoenborn Petition at 12.[3] Here, too, Petitioners ignore both the uncontradicted trial evidence and the Third Circuit's holding. Rather than being a product of Boeing's "pre-existing" design, Helicopter 22292 had a long history of Army involvement in its design, as would be expected for any sophisticated Army weapons system. The Third Circuit correctly noted that the design of the Chinook type helicopters was developed by "Boeing and the Army" in the 1960s. *In re Air Crash Disaster at Mannheim, Germany on 9/11/82*, 769 F.2d 115, 118 (3d Cir. 1985). Moreover, the design of the particular Chinook involved in this accident was "the culmination of years of negotiations on earlier contracts for earlier models of the Chinook." *Id.* at 124 n.10. The specific contract for Helicopter 22292 expressly provided that the Army retained final authority over the design of the helicopter. *Id.*

Petitioners also suggest that Boeing withheld from the Army critical information concerning two 1966 accidents involving Chinook helicopters. Petitioners imply that Boeing alone investigated those accidents and withheld its findings from the Army. In fact, Boeing personnel merely assisted the Army's investigation of the 1966 accidents. In each case, Boeing submitted detailed reports and recommendations to the Army. In each report, Boeing concluded that lubrication starvation caused transmission failure which in turn caused failure of the sync shaft. In 1967 Boeing recommended a change in the design of CH-47 transmissions which would have prevented this type of failure. The Army's own civilian

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[3] The same blatant misrepresentation is repeated throughout both Petitions. *See, e.g.*, Schoenborn Petition at 4, 11, 15 and 18; Eschler Petition at 5, 14, 16, 20 and 23.

The Schoenborn Petition goes so far as to claim that the Chinook is the same product which Boeing sold to civilian users like British Airways. In fact, the reverse is true. Years *after* the Chinook was designed Boeing developed the model 234 helicopter for certain civilian users. The model 234 differs from the Chinook in numerous respects, most significantly in its transmission lubrication system. The model 234 has a lubrication system which the Army refused to install on the Chinook. This accident never would have happened had the Army not made that decision.

engineers recommended the change. The Army command nevertheless refused to adopt it. The uncontroverted evidence at trial was that had the Army adopted this recommendation, the Mannheim accident would never have happened.

Petitioner Eschler's argument on Question #5 further claims there was inadequate clearance between the helicopter's sync shaft and the fuselage structure at Station 120. Eschler Petition at 25. Both Petitioners make this claim elsewhere in their Petitions. Only because it is repeated so many times in the Petitions does Boeing feel it is necessary to respond by making two observations. First, the clearance between the sync shaft and Station 120 was mandated by the aircraft's detail drawings with which the Army required compliance. 769 F.2d at 123. Petitioner Eschler acknowledges this uncontroverted evidence. Eschler Petition at 25. Second, as the Third Circuit held, knowledge about the tendency of the sync shaft to fail when it hits structure "is irrelevant to the government contractor defense in this case" because sync shaft contact with Station 120 could occur only after a massive transmission failure, something the U.S. Army indisputably knew. 769 F.2d at 124-25. The Mannheim accident was just such a failure. Everyone, including Petitioners' expert witness, agreed on that point. Petitioners nevertheless obscure this key fact.

Finally, Petitioners' arguments about what the jury did are also misleading. The district judge allowed this case to be tried as if Chinook helicopters were ordinary consumer products. Applying Pennsylvania's consumer products liability law (over Boeing's strenuous objections), the district judge virtually compelled the jury's answers to the special verdict questions (there was no general verdict). The district judge charged the jury:

> If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for use . . . , then the product was defective. . . .

His charge on negligence included this instruction:

> If you find that product [sic] was defective, the defendant is liable for all harm caused by such defective condition.

Since Boeing itself had proposed a change in the design which Boeing said was needed to make the helicopter safe, and the Army rejected that change, the jury's findings of defect and of negligence were for all intents and purposes directed by the trial judge.

REASONS FOR DENYING THE PETITIONS

SUMMARY OF ARGUMENT

The Petitions for Writ of Certiorari should be denied because

I.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING REVIEW ON WRIT OF CERTIORARI IN THIS STATE LAW CASE

II.

PETITIONERS' QUESTIONS PRESENTED FOR REVIEW ARE NOT RAISED BY THE DECISION BELOW OR BY THE RECORD

ARGUMENT

I.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING REVIEW ON WRIT OF CERTIORARI IN THIS STATE LAW CASE

None of the Supreme Court Rule 17 considerations governing review on certiorari is present in this case. Petitioners are seeking review of the Third Circuit's application of Pennsylvania law in a diversity case. The Third Circuit, after reviewing the entire trial record and drawing all inferences in favor of

Petitioners, held that Pennsylvania law does not impose tort liability on the manufacturer of an aircraft for the U.S. Army where the Army, exercising military judgment and with full knowledge of the design of a critical component, not only ordered the helicopter to the Army's specifications, but also specifically required the very design which was allegedly defective. *In re Air Crash Disaster at Mannheim Germany on 9/11/82*, 769 F.2d 115, 120 (3d Cir. 1985). That is all the Third Circuit decided.[4]

Significantly, Petitioners never claimed below that there is a federal issue in this case. To the contrary, they sought and obtained from the trial court a pretrial ruling that all issues in this case would be governed by Pennsylvania law. Before the Third Circuit they argued that "the Pennsylvania law of government contractor defense was properly applied."[5] Only after the Third Circuit concluded that Petitioners' claims must fail under "the Pennsylvania law of government contractor defense" did Petitioners begin groping for a federal issue which might be deemed worthy of consideration by this Court. Their efforts in this regard are, to say the least, extreme. They raise issues such as the scope of federal sovereign immunity which are not even arguably raised by the record below or decided by either of the courts below.

The Third Circuit merely applied reasonably settled Pennsylvania law to the facts of this case. The opinion is a sound one and the record raises no question of federal law that might justify review by this Court.

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[4] In addition to the issue actually decided by the Third Circuit, Boeing raised on appeal three other grounds for a judgment notwithstanding the verdict and eleven grounds for a new trial. Given the Third Circuit's disposition of the first ground of appeal, it was not necessary to address any of these other fourteen issues. 769 F.2d at 120 n.6.

[5] Brief of Appellees before Third Circuit at 17.

II.

PETITIONERS' QUESTIONS PRESENTED FOR REVIEW ARE NOT RAISED BY THE DECISION BELOW OR BY THE RECORD

Twice in the past two years this Court has declined review of circuit court opinions involving the government contract defense in Death on the High Seas Act cases where federal law is applicable. *See McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1985). Petitioners, having no federal issue in this case, seek to raise federal issues which might have been present in *McKay* and *Koutsoubos*. Whatever this Court's reasons were for denying review of those two cases, those same reasons *a fortiori* justify denial of Petitioners' efforts to seek review vicariously of those federal issues in this state law case.

A. This Case Does Not Involve Transfer or Expansion of the Government's Immunity (Schoenborn Question #1 and Eschler Question #1)

Both the Schoenborn and Eschler Petitions claim that the Third Circuit's opinion involves transfer or expansion of the government's sovereign immunity to include Boeing. Nothing in the Third Circuit's opinion warrants such an argument. The Third Circuit did not hold that Boeing would be immune from liability arising from its own conduct, such as a failure to manufacture a product in accordance with government specifications. Rather, the Third Circuit applied Pennsylvania law in holding that a contractor is not liable to persons injured by design features which were mandated by government specifications. In so ruling, the Third Circuit acted consistently with its own prior rulings under Pennsylvania law. *See Brown v. Caterpillar Tractor Co.*, 741 F.2d 656 (3d Cir. 1984) ("*Brown II*"); *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3d Cir. 1982) ("Brown I").

The Third Circuit's opinion is also consistent with prior Pennsylvania Supreme Court decisions. Those decisions unequivocally state that the justifications for the defense are privilege and efficiency, not any shared sovereign immunity as Petitioners claim. *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc.*, 123 A.2d 888 (Pa 1956); *Ference v. Booth & Flinn Co.*, 88 A.2d 413 (Pa. 1952). *See also Brown I, supra,* at 250-51. Indeed, the Pennsylvania Supreme Court in both *Valley Forge Gardens* and *Ference* expressly recognized the "hornbook law that the immunity from suit of the sovereign state does not extend to independent contractors doing work for the state." 123 A.2d at 889; 88 A.2d at 414. Accordingly, Petitioners' claim that the Third Circuit's opinion somehow expanded sovereign immunity simply ignores clear Third Circuit and Pennsylvania Supreme Court authority to the contrary.

Petitioners further argue that expansion of sovereign immunity is particularly unwarranted as to those claims brought on behalf of civilians rather than U.S. Army servicemen. Petitioners reason that since the government's immunity under *Feres v. United States,* 340 U.S. 135 (1950), is limited to servicemen, Boeing can only share the United States' sovereignty with respect to claims on behalf of servicemen. *See* Schoenborn Petition at 6-7; Eschler Petition at 12-13. This reasoning suffers from two fatal flaws, however. First, as already explained, the government contract defense under Pennsylvania law is expressly based upon privilege and efficiency rationales and "is distinct from the state's sovereign immunity." *Brown I, supra,* at 251. Significantly, the plaintiffs in both *Valley Forge Gardens* and *Ference* were civilians.

Second, the United States *is* immune against all of Petitioners' claims, not just those brought on behalf of U.S. servicemen. This accident occurred in Mannheim, West Germany. Since the United States has not waived its immunity under the Federal Tort Claims Act for "any claim arising in a foreign country,"[6] the United States is immune against all civilian claims arising from this accident. However, this does

[6] 28 U.S.C. § 2680(k)

not leave the civilian plaintiffs uncompensated. The NATO Status of Forces Agreement (SOFA)[7] establishes a mechanism for compensating civilians who are injured or killed by American troops in Europe. Although the United States participates in settlement of those claims, the remedy against the United States under SOFA is exclusive. *See, e.g., Shafter v. United States,* 273 F. Supp. 152 (S.D.N.Y. 1967), *aff'd,* 400 F.2d 584 (2d Cir. 1968), *cert. denied,* 393 U.S. 1086 (1969). The SOFA treaty reflects the government's considered decision that civilians shall be compensated[8] under the treaty mechanism rather than through litigation against the government. Therefore, even if the Pennsylvania government contract defense were based upon shared sovereign immunity, the civilians' claims in this case would still be barred by that defense.

B. The Third Circuit's Decision Does Not Conflict With the Decision of Any Other Court of Appeals (Schoenborn Question #2 and Question #4)

The Schoenborn Petition contends that the Third Circuit erred in applying Pennsylvania law rather than federal law with respect to the tort liability of a government contractor. Citing the Fifth Circuit's recent decision in *Bynum v. FMC Corp.,* 770 F.2d 556 (5th Cir. 1985), which applied the government contract defense under federal common law, Petitioner Schoenborn then claims that the split in authority over whether state or federal law controls justifies review of this case. Schoenborn

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[7] The relevant portions of Article VIII(5) of SOFA are set forth in Appendix A to this brief.

[8] Petitioners describe the Third Circuit's decision as one which will "eliminate completely the legitimate claims of all civilians" by leaving them without a remedy. Schoenborn Petition at 20; Eschler Petition at 11. This is patently false. The SOFA treaty provides that "[c]laims shall be . . . settled or adjudicated in accordance with the laws and regulations of [West Germany]." Under the West German Air Traffic Law, the U.S. Army, as owner and operator of a military aircraft, is automatically liable for full compensable damages up to a statutory limit of 320,000 Deutsch Marks for injury to or death of a civilian in a crash. Claims are processed by the Defense Cost Office, an agency of the German government. The 320,000 Deutsch Marks limit on recovery is not applicable if the owner-operator is guilty of gross negligence, as the U.S. government may have been in this case. At the time of the trial all of the foreign civilian plaintiffs had filed administrative claims with the Defense Cost Office.

Petition at 8-11. Petitioner buttresses this argument by suggesting that the federal courts have followed widely differing standards in applying the government contract defense, resulting in "total chaos." Schoenborn Petition at 15. For three distinct reasons this argument is without merit.

First, as explained previously in this brief, Petitioners' present claim that federal law on the government contract defense applies in this action is diametrically opposed to the position which they have heretofore taken in this litigation. Before both the district court and the Third Circuit, Petitioners strenuously and repeatedly argued for the application of Pennsylvania law. Brief of Appellees before Third Circuit at 17; Appellees' Petition for a Rehearing before Third Circuit at 10. Because Petitioners' argument for application of federal law is being raised here for the first time, this Court should decline to consider it. *United States v. Ortiz,* 422 U.S. 891 (1975)

Second, the Third Circuit, whatever its abstract view on the question whether state or federal law should govern, specifically held *in this case* that there is no conflict between them. Since Boeing would not be liable under either Pennsylvania law or federal law as articulated in *Bynum,* the question as to which law governs is simply irrelevant.

Finally, the law in this area does not reflect "total chaos," notwithstanding Petitioners' considerable efforts to create some. To the contrary, the Third Circuit's opinion is thorough, articulate and consistent with prior Third Circuit decisions and governing decisions of the Pennsylvania Supreme Court. Moreover, the result is consistent with decisions of the Fifth, Seventh, Ninth and Eleventh Circuits in cases involving the government contract defense under federal law or the laws of other states. *See Burgess v. Colorado Serum Co.,* 772 F.2 844 (11th Cir. 1985) (Alabama law); *Tillett v. J.I. Case Co.,* 756 F.2d 591 (7th Cir. 1985) (Wisconsin law); *Bynum v. FMC Corp., supra* (federal law); *McKay v. Rockwell International Corp., supra* (federal law); *Koutsoubos v. Boeing Vertol, supra* (federal law); *Brown I* and *Brown II, supra* (Pennsylvania law). Petitioners may disagree with the approach taken by all five of these circuits, but their claim that the opinions of these courts represent "total chaos" could not be further from the truth.

C. The Third Circuit Did Not Review All of the Evidence in a Light Most Favorable to Boeing (Schoenborn Question #3)

The Schoenborn Petition makes the incredible allegation that the Third Circuit based its decision on "facts interpreted in the light most favorable to the losing defendant." *See* Schoenborn Question Presented for Review #3; Schoenborn Petition at 11-13. This is preposterous. No circuit is more meticulous than the Third in insisting that all factual issues be resolved by the trier of fact. The Third Circuit in this case expressly noted that entry of judgment in Boeing's favor would be justified "only where, upon review of all of the evidence and drawing all inferences in favor of the verdict winner, judgment for the verdict loser is demanded as a matter of law." 769 F.2d at 123. To claim that the judges of the Third Circuit did otherwise affronts the dignity and integrity of that court.

D. The Third Circuit Did Not Usurp the Function of the Jury (Eschler Question #3)

Petitioner Eschler claims that in reviewing the evidence the Third Circuit somehow usurped the function of the jury. Eschler Petition at 15-20. This claim is similar to Petitioner Schoenborn's claim that the Third Circuit reviewed the record improperly. *See* Section C of this brief, *supra*. The Third Circuit opinion unequivocally states that it reviewed the trial record and further identifies the proper standard utilized in that review. In their Petition for Rehearing, the Petitioners invited the Third Circuit to review that record again. Now they are asking this Court to review all the trial evidence again. Particularly where there is no federal question involved, a plea to "review all the evidence again" certainly does not constitute a "special and important" reason for granting a writ of certiorari. *See* Supreme Court Rule 17.1.

E. The Case Does Not Present for Review Any Issue Regarding the Separation of Powers Doctrine (Eschler Question #2)

There is no issue for resolution in this case regarding separation of powers. The Third Circuit held that Petitioners' claims are barred by Pennsylvania law governing government contracts, not by the federal separation of powers doctrine. While the Third Circuit observed that separation of powers is a proper concern in a design defect case involving military weapons[9] (rather than consumer products) and this is one justification for the defense under federal law, the Third Circuit did not hold that Petitioners' claims are barred by that doctrine.

F. Complusion as an Element of the Government Contract Defense Is Not an Issue in This Case (Eschler Question #4)

Petitioner Eschler claims that Boeing cannot take advantage of the government contract defense unless it was compelled to produce a product in accordance with a particular design. Eschler Petition at 21-23. Here again, Petitioners would have this Court ignore the fact that this case was decided (at Petitioners' urging) under Pennsylvania state law. Under that law, no showing of compulsion is required.[10] *Brown I, supra,* at 254. In any event, the Third Circuit concluded that Boeing *was* compelled by its contract with the Army to produce Helicopter 22292 with the very design features which Petitioners claim are defective and without the transmission design

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[9] Petitioner Eschler attempts to characterize this case as a simple consumer product case not involving second-guessing of any military decisions. Eschler Petition at 14. This characterization ignores the central and undisputed fact that following two Army Chinook transmission failures in 1966 Boeing recommended a design change which would have prevented similar failures, including the failure at Mannheim. The Army's own civilian engineers recommended the change, but the Army military command, for reasons never disclosed, rejected that proposal. 769 F.2d at 125. Petitioners' entire case draws into question that military command decision.

[10] The Ninth Circuit has similarly determined that compulsion is not an element of the defense under federal law. *McKay v. Rockwell Int'l Corp.*, 704 F.2d at 450. The Seventh Circuit reached the same conclusion under Wisconsin law. *Tillett v. J. I. Case Co.*, 756 F.2d at 597. No federal circuit court has ever held to the contrary.

change which Boeing and the Army civilian engineers recommended, but the Army military command rejected. 769 F.2d at 124-25.

G. Whether the Third Circuit Followed All of the Law of Pennsylvania Is Not a Special and Important Issue That Warrants Review by This Court (Eschler Question #5)

Petitioner Eschler contends the Third Circuit should be reversed because the court failed to apply "all of the applicable law." Eschler Petition at 24; Eschler Question #5. However, the "applicable law" which Petitioner feels was not applied was the Third Circuit's own opinion in *Brown II* interpreting Pennsylvania law. Eschler Petition at 24-25. The interpretation and application of prior Third Circuit decisions is a function peculiarly appropriate for the Third Circuit. Petitioners' displeasure over the outcome certainly does not create a special and important issue that warrants review by this Court.

CONCLUSION

For the reasons set forth herein, the Petitions for Writ of Certiorari should be denied.

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APPENDIX A

Article VIII(5) of SOFA provides, in relevant part:

> Claims . . . arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, . . . shall be dealt with by the receiving State in accordance with the following provisions:
>
> (a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.
>
> (b) The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.
>
> (c) Such payment whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive . . . .

NATO-SOFA, 4 U.S.T. 1792, 1806-08.